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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DENSON G. HENDERSON,

Defendant and Appellant.

B209606

(Los Angeles County  
Super. Ct. No. SA059682)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Elden S. Fox, Judge. Affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan  
Pithey and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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Denson Henderson was convicted of several counts of robbery, kidnapping, and forcible sex crimes. In this appeal, he claims he was denied his right to a fair trial based on the prosecution's failure to disclose material evidence. He also asserts sentencing error. We affirm.

### **FACTUAL AND PROCEDURAL SUMMARY**

Appellant was convicted of crimes occurring on two different dates. Counts 22 and 23 involved the second degree robbery and rape by foreign object of Katie B. on February 16, 2006. Since no issues are raised as to these crimes, we do not set out the facts regarding that incident.

The remaining crimes occurred on February 21, 2006. About 7:00 p.m. on that date, Emily R.'s car got stuck in the carport of her friend Elinor's apartment in West Hollywood. She called for a tow truck, but the driver had to leave to get additional equipment. While Emily waited for him to return, she walked with Elinor and Elinor's boyfriend, Matt, to a nearby restaurant. Just after they were served, Emily received a call from the tow truck driver. She told her friends she would be right back, and walked to her car. The driver dislodged the car. Emily got into it, backed out, and pulled into a parking space on the other side of the street. At that point, Emily spoke to Elinor on the phone and told her she would return to the restaurant. She never arrived.

As Emily walked from her car toward the restaurant, she heard fast footsteps and male voices behind her. A man she later identified as appellant grabbed her from behind and put his hand over her mouth. A voice said, "Okay. This is a robbery. We just want your money. We're not going to hurt you." Appellant dragged Emily across the street to a darker area. The other man, later identified as codefendant Jovanny Theus,<sup>1</sup> took her purse and rummaged through it. The men asked her how much money she had on her

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<sup>1</sup> We affirmed Theus's conviction in a nonpublished opinion. (*People v. Theus* (Apr. 20, 2009, B207665) [nonpub. opn.].)

person and how much she had in the bank. Emily told them she did not have much money.

The men took Emily back to her car, where Theus unlocked the door with her keys and got into the driver's seat. Appellant put Emily in the back seat and got in next to her. The men asked her about each of the credit cards in her wallet. Then they told her they were going to take her to a bank. While Theus drove the car, appellant forced Emily's head onto his lap. She saw a knife in his hand.

The car stopped near a bank. Appellant dragged Emily out of the car to the ATM. He handed her debit card to her and told her to withdraw \$600. When that attempt failed, he had her try \$500, then \$400, but she could not withdraw those amounts either. Appellant started to drag Emily back toward the car, but she feigned an asthma attack in an attempt to get away. Appellant grabbed her again, shook her very hard, and pushed her back into the car.

According to Emily, "The man that I was with at the bank [appellant] pushed me back in the car. I believe he was still holding onto my arms. He sat in the car with me behind the passenger seat again. Closed the door, and he began to tell the man who was driving [Theus] that I had tried to get away; that I had—I believe he used the words, 'she tried something funny.' He said something to that effect. 'If she does it again, show her the pistol and shoot her.'"<sup>2</sup> Theus backed up and hit the car behind them, then drove off. As the car began moving, appellant forced Emily to orally copulate him. He forced her to change positions and he stuck his fingers inside her vagina. Then he forced her to orally copulate him again.

At some point, the car stopped. Appellant put something over Emily's head so she could not see, and led her out of the car into a room. He pushed her onto a bed and told her to take off her clothes. He told her that because she could not get them money, they wanted her to pay them "in other ways." He said they would be back for her. Emily took

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<sup>2</sup> It is unclear from the record whether appellant or Theus made this last statement.

off her clothes, and when the two men returned she was forced to perform numerous sex acts with both of them.

The men eventually left the room, then returned with a camera. One of the men put masking tape over Emily's eyes, and they forced her into various positions while appellant took photographs of her. During this time, a sharp, heavy, cone shaped object was forced into Emily's vagina. That was removed and something that felt like a soda or beer can was inserted part way into her vagina.

One of the men handed Emily a piece of paper and a pencil and told her to write down her full name, social security number, address and the PIN number for her bank. She did as instructed, and then appellant left the room, leaving her alone with Theus. He talked to Emily about his life, then forced her to engage in additional sex acts.

At some point, appellant returned to the room holding a gun. He showed it to Emily and told her, "This is the gun that we would use on you' or 'would have used on you if you tried anything, you tried to get away again' . . . ." Appellant told her they owed somebody a great deal of money, and that they thought she was lying about how much money she had. She insisted she did not have any money, and they asked whether she knew anyone who would give her the money. She said she might be able to get some, and the men asked her how much. Emily first said \$1,000, then \$2,000, but the men kept asking until she said she would try to get \$6,000.

Theus then said he did not want to keep Emily against her will any longer. Emily believed he was ready to let her go, and she suggested it would be best if they released her back to her family. She promised she would find the money for them and would not tell the police. Appellant handed Emily her cell phone and told her to call someone. She called her sister, told her she had lost a lot of money at a casino in Sherman Oaks, and that she needed \$6,000 or "they're going to take my car . . . ." Emily tried to communicate that she was in a lot more trouble than that. A man who identified himself as a deputy sheriff then got on the phone on her sister's end and started talking. Emily talked over his voice so her captors would not hear him. She asked him if he had \$6,000 to get her out of her problem. Appellant took the telephone away from Emily and ended

the call. The men continued to press her to obtain money for them. She called her mother, but there was no answer. Some time during the ordeal, the men instructed Emily to call her bank.

Emily convinced the men she would not be able to get money until the banks opened at 9:00 a.m. Appellant told her that if they released her, she would have to call them every two hours. He warned that if she did not come up with the money and went to the police, he would make sure she was killed. Appellant left the room, and Emily begged Theus to let her go. Appellant returned, and Theus left the room. Appellant took Emily outside and forced her to orally copulate him again. Then he grabbed her, put her into the front passenger seat of her car, put her head down on the console between the seats, and closed the door. Theus was in the driver's seat.

Appellant disappeared, and Theus drove off with Emily. Emily's phone was in the middle console. While they were driving, Emily heard her cell phone ring. Theus told her to answer it and to tell the caller that she was on her way home. The call was from a friend, and Emily just said, "I'm on my way home" and hung up." There was a second call, this time from her sister. Emily again said she was on her way home. Her sister told her to go to Santa Monica and San Vicente.

Theus stopped the car near an entrance to the 405 Freeway. He asked Emily if she would be able to find her way home from there, and she said yes. Theus got out of the car, Emily moved over to the driver's side, locked the doors, and drove off. Eventually she arrived at a convenience store near the sheriff's station at Santa Monica and San Vicente. She went in, told the employees she had been kidnapped, raped, held hostage and released, and that she needed help. She called her sister, and a deputy sheriff came and brought her to the station.

Several weeks after the incident, Emily identified appellant and Theus from photographic lineups. A search conducted at a house and converted garage on West 53rd Street yielded items consistent with Emily's description of the location where she was held hostage. Items were found and seized that showed appellant lived at the location. Nakeya Whitman was present at the address being searched, and one of the officers

recognized her as the woman seen on a bank video, successfully using Emily's ATM card to withdraw money from the bank. Whitman ultimately pled no contest to related charges.

Appellant was charged and convicted of second degree robbery (counts 1 and 22); kidnapping for carjacking (count 2); kidnapping to commit robbery (count 3); attempted first degree ATM robbery (count 4); kidnapping to commit a sex crime (count 5); forcible oral copulation (counts 6 and 15); sexual penetration by foreign object (counts 7 and 23); forcible rape in concert (counts 8, 9, and 10); forcible oral copulation in concert (counts 12, 13, and 14); sodomy by force while acting in concert (counts 16 and 17); and rape by foreign object while acting in concert (counts 18 and 25). The jury found aggravated kidnapping allegations to be true, and the court found prior conviction allegations true. This is a timely appeal from the judgment of conviction.

## **DISCUSSION**

### **I**

Appellant claims he was denied his constitutional right to a fair trial based on the prosecution's failure to disclose the victim's mobile phone records, which supported her version of the facts.

Emily testified about her ordeal. During redirect examination, the prosecution marked as an exhibit Emily's cell phone records. Both defendants objected because they had not received the records in discovery, nor had they received notice that the prosecution would offer them at trial. The court allowed the prosecutor to lay a foundation, and Emily was questioned about telephone numbers in the document reflecting outgoing and incoming calls during the time of the incident. The telephone records corroborated Emily's testimony, including her statements about calling for a tow truck, calling the bank, and calling her sister.

Theus's counsel moved for a mistrial based on the prosecutor's failure to show the records to the defense before introducing them. He asserted that these records provided a time frame for the charged crimes, and that the prosecutor had deprived the defense of the

opportunity to analyze this “significant” evidence. Appellant’s counsel joined in the motion.

The prosecutor indicated she had acquired the records sometime that morning, September 24, 2007, from the case detective present in court that day. The detective found the telephone records in Detective John Hanson’s case book that morning, after being instructed by Detective Hanson where to look for them. A facsimile cover sheet accompanying the phone records indicated they had been obtained by a third detective on February 28, 2006, pursuant to a court order. The court asked the prosecutor if she knew why the records were not turned over to the defense. She stated she did not know anything about it.

The court denied the motion for mistrial, but told defense counsel to “take as much time as you need” to analyze the records, including appointment of an investigator if the defense thought it would be helpful. “[T]he victim will be subject to recall on any issues regarding this particular document. And if there is any other discovery relating to documents obtained during the course of this investigation, they should have been turned over to counsel. The next example of the L.A. County Sheriff’s Department doing this, and I will give an instruction to the jury of a failure to comply with discovery.”

Theus’s counsel asked for a preclusion order based on this discovery violation. The court responded that there was in fact a discovery violation, and gave counsel “permission to take what is a reasonable period of time to do whatever investigation you need in terms of telephone numbers. Right now there have only been four referenced. And we can take up any other issues at a later point. It just means that Ms. Emily R. is going to have to be subject to further examination in this matter if counsel deems it appropriate.” The court was “chagrined” but did not think the discovery violation rose to a level of a mistrial, depending on other issues that might come up pursuant to the defense investigation of the phone records. Defense counsel did not request additional time to investigate, and trial continued with the recross examination of Emily.

Penal Code section 1054.1 requires the prosecuting attorney to disclose to the defendant and the defendant’s attorney all relevant evidence seized or obtained as a part

of the investigation “if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies[.]” In response to the court’s questions, the prosecutor stated she acquired the records the morning she sought to introduce them at trial. She explained that she asked “the detectives who are here ‘were the phone records ever obtained? Do we have them?’ They went into the jury room at some point today, went looking through Detective Hanson’s stuff, and then they provided me with some cell phone records.” She indicated she did not know exactly where these phone records were, or how they were obtained. From this, it appears the prosecutor did not obtain the records before the day she sought to introduce them at trial. And we infer from her statement that she did not know these records were in the possession of the investigating agency before that date. Technically, there was no discovery violation. (But see *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 48, fn. 10 [although prosecutor personally complied with disclosure obligations, police negligence in failing to turn over discovery materials should be attributed to prosecutor].)

The trial court properly exercised its discretion in crafting a remedy for the prosecution’s failure to disclose the telephone records at an earlier date. (See *People v. Ayala* (2000) 23 Cal.4th 225, 299.) Defense counsel was offered as much time as needed to analyze the telephone records, including the appointment of an investigator if counsel thought that would be helpful. The court ordered that the witness be subject to recall on any issues relating to the telephone records. These measures ensured the defense would be able to address the newly disclosed records.

Neither is there a showing of prejudice from the late disclosure. Appellant argues that if defense counsel had realized Emily’s story would be corroborated “down to the minute” with the record of calls, “there is little doubt the defense would have proceeded to question the timeline she set forth in a different manner.” The records were introduced during the prosecution’s case-in-chief. Both defendants had reserved opening statement, so there had been no commitment made to the jury that Emily’s credibility would be challenged by a lack of proof that she made the calls when she said she did.



The defense was that Emily had consensual sex with both defendants, and that she was lying about being kidnapped and subjected to forcible sex crimes. Even if the phone records corroborated the timing of the cell phone calls, they did not corroborate their content. The real challenge to Emily's credibility was not the timing of her cell phone calls, but her affect in reporting the events. Detective Hanson interviewed Emily shortly after her release. Despite the fact that she was describing very painful events that had just taken place, Emily's demeanor throughout the interview was matter of fact. This bothered the detective. He was troubled by Emily's statements indicating her allegiance to her captors; she was emphatic about wanting to get them the money she had promised them. And he thought it was a little strange that Emily had been released in her own vehicle. Emily told Detective Hanson she was upset that her mother and her sister did not believe her. Appellant was not deprived of an opportunity or a strategy to challenge Emily's credibility.

Appellant argues that the failure to timely disclose the records was not just a discovery violation, but also a violation of his state and federal constitutional rights to a fair trial. There is no argument that the telephone records constituted exculpatory evidence within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83. "For *Brady* purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. [Citations.] Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Citation.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 3990, 421, fn.22.) Neither element exists here.

Quoting *Morgan v. United States* (1938) 304 U.S. 1, appellant argues that the prosecution's surprise introduction of this inculpatory evidence in the middle of trial denied him "a reasonable opportunity to know the claims of the opposing party and to meet them." Emily's description of the events at all times included the making and receiving of calls on her cell phone. The telephone records which corroborated this portion of her story did not raise a new claim by the prosecution which appellant had to meet. Nor were they available exclusively to the prosecution, and the prosecution has no

duty to conduct the defendant's investigation for him. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1134.) The late disclosure of the telephone records did not deprive appellant of a fair trial.

## II

Appellant claims the case must be remanded for resentencing as to the One Strike sentences for aggravated kidnapping involving Emily because the court did not make a determination whether one or more of the crimes was committed on a separate occasion, as required under the version of Penal Code section 667.61 in effect at the time the crimes were committed.

In February 2006, when the crimes were committed, Penal Code section 667.61, subdivision (g) provided: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable."<sup>3</sup> "[F]or the purposes of [former] Penal Code section 667.61, subdivision (g), sex offenses occurred on a 'single occasion' if they were committed in close temporal and spatial proximity." (*People v. Jones* (2001) 25 Cal.4th 98, 107.)

Respondent correctly notes there is no requirement that a court make an express finding whether or not the sexual offenses were committed on a single occasion, within the meaning of former Penal Code section 667.61, subdivision (g). (Compare Pen. Code, § 1170, subd. (c) ["The court shall state the reasons for its sentence choice on the record at the time of sentencing."].) "[W]here a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order." (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) That

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<sup>3</sup> The crimes were committed on February 21 and 22, 2006. Penal Code section 667.61 was amended later that year, omitting this language and substituting other provisions on consecutive sentencing.

presumption is particularly apt here, since the court made specific findings as to other counts, where it concluded appellant did not have a meaningful opportunity to reflect on his conduct for purposes of section 667.61. For example, as to count 9, rape in concert, the court stated: “Pursuant to 1170.12 and 667.61, subdivision (b), the court finds this offense occurred on the same occasion, arose out of the same operative facts as reflected in count 8, and the court further finds pursuant to 667.61, subdivision (b) that the defendant did not have a meaningful opportunity to reflect on his conduct.” The court made similar findings with respect to counts 10, 13, 14, 15, 17, 18, and 25. As to the counts without a “same occasion” finding, we infer the court determined they did not occur in such temporal and spatial proximity as to constitute a single occasion within the meaning of former Penal Code section 667.61.

#### **DISPOSITION**

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.